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In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN C. WEBB and HELEN H. WEBB, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 16-19) is reported at 256 F.2d 669. The opinion of the District Court (Pet. App. 20-28) is reported at 157 F.Supp. 401.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (Pet. App. 16). The petition for a writ of certiorari was filed on November 25, 1958, extensions of time to November 26, 1958, having been granted by Mr. Chief Justice Warren. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in this federal condemnation proceeding, the District Court abused its discretion in overruling petitioners' motion for a new trial based on the grounds (a) that the attorney for the United States improperly associated with the jury on a bus trip to view the property, and (b) that improper references were made during the trial to the price paid for the property by the petitioners in 1949.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions relied upon by the petitioners are set out in the petition (Pet. 3).

STATEMENT

The Court of Appeals affirmed, per curiam, the order of the District Court overruling a motion for a new trial in this condemnation suit brought by the United States in 1955 to condemn certain land in Montgomery County, Maryland, belonging to petitioners (Pet. App. 16-28). The facts pertinent to the questions presented by this petition may be summarized as follows:

The land which was taken by the United States comprised approximately 23 acres of a tract of 200 acres that had been acquired by the petitioners in 1949. Each side produced expert witnesses who differed widely in their valuations. The witnesses for the United States valued the entire tract at $56,000 to $60,000 and valued the portion taken at $8,500 to $10,000. The witnesses for the petitioners valued the entire tract at approximately $91,000 and valued

the part taken at $41,350 to $43,000. The jury awarded petitioners the sum of $14,000 (Pet. App. 17, 20).

The attorney for the United States, making a general explanation of the subject matter of the trial in his opening statement, pointed out that the entire tract had been purchased by petitioners some years before for $23,000. Counsel for petitioners objected. The court deferred ruling because it could not determine in advance of the testimony whether the date of purchase was too remote from the date of taking by the Government as to make it inadmissible (Pet. App. 27).

After the opening statements by counsel for both parties, the jury was sent in a body with Deputy Marshals to view the property. It was arranged that they were to be accompanied by the lawyers on both sides. The judge announced that the property owners or their lawyers might point out the lines of the property but that nobody was to say anything to them about the value of the land. Accordingly, the jury, with court officials and the attorney for the Government, rode in a bus from the court house in Baltimore to the property, but by reason of some misunderstanding petitioner (Mr. Webb) and his attorney failed to appear at the appointed time and consequently did not ride with the jury in the bus. They proceeded to the property by private automobile and there met the jury. When the tour of inspection had ended, Mr. Webb and his attorney were offered an opportunity to return to Baltimore in the

bus with the jury but they found it more convenient to decline because they could reach their homes more directly by another route (Pet. App. 17-18). No objection was made by petitioners' attorney as to what had transpired (Pet. App. 26).

Later, during the course of the trial, in the examination of one of the Government's expert witnesses reference was made a second time to the price petitioners had paid for the property in 1949, but upon objection by counsel for petitioners the evidence was stricken. At that time and subsequently, in his concluding argument, the attorney for the United States explained that he had referred to the purchase price to enable the appraisers to consider the increases in the value of the land in the area and that the Government did not contend that the property was worth only $23,000, but had in fact offered two expert witnesses who had testified that the property was worth $56,000 to $60,000 at the time of the taking in 1955. No objection to this statement was made by the attorney for the petitioners (Pet. 7; Pet. App. 18-19, 27-28; R. 18-26).

After the jury had returned its verdict the attorney for the petitioners withdrew his appearance as counsel and two other attorneys who had not been counsel in the case before that time appeared for the petitioners and filed a motion for new trial urging as error (a) improper conduct of the jury and counsel for the Government in riding on the bus without counsel for petitioners and (b) reference during the trial to the price petitioners paid for the property.

The district court heard evidence and argument on this motion. It ruled that there had been no improper conduct by the attorney for the United States, that the mere fact of his presence on the bus without counsel for petitioners did not prejudice petitioners, and that reference to the price paid by petitioners for the property was understood in context by the jury and was expressly excluded as evidence of value both by the attorney for the United States and by the court (Pet. App. 20-28). The court of appeals affirmed per curiam. It carefully reviewed the record and found that there was "no evidence of any impropriety" on the part of Government counsel, that, under the circumstances presented, "no harm was done to the property owners by the references to the price which they had paid for the property," and that, accordingly, the district court did not abuse its discretion in overruling the motion for a new trial (Pet. App. 16-19).

ARGUMENT

1. Petitioners do not say that the jurors were in fact prejudiced in favor of the Government, nor do they say that the attorney for the Government did or said anything to influence the jury. After careful consideration of the entire matter, both Judge Chesnut and the Court of Appeals found no evidence of impropriety. Petitioners merely suggest that bias or prejudice "might have" resulted from the fact that Mr. Webb and counsel did not accompany the rest of the party in the bus to view the property and that "team work" was "bound" to develop between

the attorney for the Government and the jury, with petitioners and their attorney becoming the outsiders or stranger. Petitioners' counsel who was involved at the time did not suggest any such possibility. It has only been raised after trial and rendition of the verdict. The arguments advanced as to such subtle influence do not justify setting aside a verdict resulting from what Judge Chesnut characterized as "a full and fair trial on the merits of the case" (Pet. App. B 25). As was stated in *United States* v. *Sorcey*, 151 F.2d 899, 903 (C.A. 7), certiorari denied, 327 U.S. 794: "But, we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court * * *."

In the federal courts, if there had been improper conduct sufficient to raise a presumption of prejudice, the presumption would be rebuttable and not conclusive as petitioners contend. *Remmer* v. *United States*, 347 U.S. 227, 229; *Mattox* v. *United States*, 146 U.S. 140, 148-150; *Wheaton* v. *United States*, 133 F.2d 522, 527 (C.A. 8). Where the trial court has considered and decided a motion for new trial on the basis of possible prejudice of the jury, its decision is discretionary and reviewable by a federal appellate court for abuse of discretion only. *Wiltsey* v. *United States*, 222 F.2d 600 (C.A. 4); *United States* v. *Sorcey*, 151 F.2d 899 (C.A. 7), certiorari denied, 327 U.S. 794; *Ryan* v. *United States*, 191 F.2d 779 (C.A. D.C.), certiorari denied, 342 U.S.

928; *Turner* v. *United States*, 222 F.2d 926 (C.A. 4), certiorari denied, 350 U.S. 831.

It seems evident, as found by the two courts below, that the suspicion advanced by petitioners is without substance and that a presumption of improper influence can not be supported on such conjecture. In any event, there is nothing presented which calls for a review by this Court of the discretion exercised by the trial court in refusing a new trial. It was according to law and supported by reason.

2. The second ground on which the motion for new trial is based is likewise untenable (Pet. App. 18). Judge Chesnut examined the transcript and found no substantial reasons for granting a new trial in view of the context in which the reference was made to the price petitioners paid for the property (Pet. App. B 26-27). He had expressly excluded it as evidence of value. The Court of Appeals also examined the transcript and reached the same conclusion. In addition, it pointed out that (Pet. App. 19): "At no time did they move the court to declare a mistrial on the ground that the mention of the purchase price was prejudicial, nor did they take any exceptions whatsoever to the judge's charge to the jury, which made a fair resume of the evidence and left to the jury to decide whether the land that was taken should be valued as agricultural land or land subject to subdivision and development for residential purposes." In these circumstances, it cannot reasonably be said that petitioners did not have a fair trial or that the judge abused his discretion in overruling the motion for a new trial.

CONCLUSION

The decision by the Court of Appeals is correct and does not call for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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